

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

76-801

MACK B. RICHMOND,

Petitioner,

—against—

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA**

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*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

Petitioner respectfully prays that a writ of certiorari issue to review a decision of the Supreme Court of Virginia, reversing a judgment entered in favor of Petitioner based on a jury verdict in the sum of \$125,000.00, recovered in the Circuit Court of the City of Richmond, Division I, and entering final judgment in favor of the Respondent.

Opinions Below

The Memorandum Opinion of the Trial Judge, Judge James Edward Sheffield (A. 1),* denying Respondent's post-verdict motions is not reported.

* A. references are to appendix to this petition.

The opinion of the Supreme Court of Virginia (A. 19) was written by Justice Albertus S. Harrison, Jr. The Chief Judge of the Supreme Court of Virginia, P'Anson, dissented without an opinion. The opinion is not yet officially reported.

The Supreme Court of Virginia denied a rehearing (A. 33) by order dated October 8, 1976.

Jurisdiction

Jurisdiction in the action below was under the Federal Employers' Liability Act (45 U.S.C. §51 et seq.), the claim being that of a railroad employee to recover damages for personal injuries.

The judgment and order of the Supreme Court of Virginia reversing Petitioner's judgment and entering final judgment for the Respondent was entered on September 2, 1976. The petition for rehearing was denied on October 8, 1976. This Court has jurisdiction to review the judgment by granting a writ of certiorari pursuant to the provisions of 28 U.S.C. §1257(3).

Question Presented for Review

1. Whether the 7th Amendment of the Constitution of the United States and Federal standards are applicable to the review of judgments in Federal Employers' Liability Act cases in State Appellate Courts so as to bar a State Appellate Court from making findings of fact contrary to those found by a jury and approved by the Trial Judge the basis of a final judgment in favor of the verdict loser at trial?

Statutes Involved

Article VI, Clause 2 of the Constitution of the United States provides:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment 7 to the Constitution of the United States reads:

"Trial by Jury in Civil Case.—In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise *re-examined* in any Court of the United States, than according to the rules of the common law." (Emphasis supplied.)

The pertinent section of the Federal Employers' Liability Act (45 U.S.C. §51 et seq.) is as follows:

"§56. * * * The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Statement of the Case

Petitioner, a Conductor in the freight service of the Respondent, recovered a judgment for damages in a Circuit Court of the City of Richmond in the sum of \$125,000.00, entered on a jury verdict. The evidence at the

trial included testimony from which a jury could find *inter alia* that a cause of his injuries was the swaying of a box car over tracks in a poorly maintained yard which caused Petitioner to be rolled against a standing car on an adjacent track, the clearance between the two cars being insufficient to clear the Petitioner's body as he climbed down a ladder at a lead corner of the car to perform his duties. The Trial Judge found that, under the FELA (45 U.S.C. §51), there was adequate evidence for jury determination and denied the railroad's post-verdict motions (1a). The Supreme Court of Virginia selected evidence favorable to the railroad as being issue determinative, ignored or otherwise downgraded the evidence which would support the jury verdict, found that the evidence established 100% negligence on the part of the employee (32a), and entered judgment for the railroad.

Reasons for Granting Writ

The Supreme Court of Virginia has done something that no appellate court in the Federal judicial system could do—certainly not in an FELA case in the last 25 years. The Supreme Court of Virginia, contrary to both the second portion of the 7th Amendment to the Constitution of the United States and in disregard of the teachings of this Court during its era of rigorous oversight to secure the benefit of jury determination of fact issues in FELA cases,¹ has disregarded evidence supporting a jury verdict and has made its own selective factual determinations the basis for entering a judgment against an injured railroad worker as a matter of law.

While citing Federal authorities in its opinion, the Supreme Court of Virginia misunderstood its role in FELA

¹ Cases are listed as footnote 1, pages 9 and 10, *infra*.

cases by a mistaken reliance on *Brady v. Southern R. Co.* (1943), 320 U.S. 476.²

It is self-evident after a jury verdict and the considered denial by the Trial Judge of post-verdict motions (A. 1 to A. 18) that there is at least, *prima facie*, a rational basis to outlaw appellate reversal under the guise of the *Brady* formulation. There is no suggestion here that either the Trial Judge or the jury were improperly influenced or that the jury was not properly instructed on the law or on its role as fact finders. Subsequent decisions by this Court (footnote 1, pages 9 and 10, *infra*) have honed the authority of *Brady* to the proposition that a trial court has the right to direct verdicts or grant judgments n.o.v., even in an FELA case, but only if there is no version of the evidence which will support a contrary verdict. See *Boeing Company v. Shipman*, 411 F.2d 365 (Fifth Circuit, 1969) but compare *Davis v. Burlington Northern, Inc.*, 541 F.2d 182 (Eighth Circuit, 1976), petition for writ pending, with *Chicago, R.I. & Pac. R. Co. v. Melcher*, 333 F.2d 996 (Eighth Circuit, 1964).

The Seventh Amendment jury trial is part and parcel of the remedy afforded railroad workers under the FELA. *Schulz v. Penn. R. Co.* (1956), 350 U.S. 523.

The federal standard for reviewing the sufficiency of evidence in FELA cases at an appellate level has recently been clearly stated by the Seventh Circuit in *Heater v.*

² *Brady* is also authority for the need of a uniform rule as to the necessary amount of evidence for jury determination in FELA cases, whether the case be tried in State or Federal Courts. In the same year that the Supreme Court decided *Brady* it also decided *Bailey v. Central Vermont Ry.*, 319 U.S. 350, saying (354): "To deprive [railroad] workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Chesapeake & Ohio Ry. Co., 497 F.2d 1243 (1974), cert. den., 419 U.S. 1013, in which the Court said:

"The test of a jury case, under the FELA, 'is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought.' Id. at 506 (emphasis added). The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. In passing on the issues of fault and causality, moreover, the jury has a broad power to engage in inferences. 'The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944). The jury's verdict can only be set aside 'when there is a complete absence of probative facts to support the conclusion reached.' *Lavender v. Kurn*, 327 U.S. 645, 653,* 66 S.Ct. 740, 90 L.Ed. 916 (1946). The Supreme Court has repeatedly warned that in FELA cases, 'courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' *Tennant v. Peoria & Pekin Union Ry. Co.*, supra at 35."

Federal appellate courts following the teachings of *Rogers v. Missouri-Pacific*, 352 U.S. 500, and *Webb v. Illinois Central R. Co.*, 352 U.S. 512, are proscribed from selecting those facts which would deprive the plaintiff of a jury determination in FELA cases and entering judgment in

* The Supreme Court saying in *Lavender*: "It is no answer to say that the jury's verdict involves speculation and conjecture."

favor of the verdict loser. The same restrictions on appellate latitude in FELA cases should expressly be imposed on State appellate tribunals reviewing FELA judgments. *Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108 (and p. 10, *infra*).

This Court has also said, in *Arnold v. Panhandle & S.F. R. Co.*, 353 U.S. 360, that injured rail employees having asserted Federal rights governed by Federal law are entitled to be fully protected even though their actions are asserted in the State courts. In the *Arnold* case this Court, citing *Davis v. Wechsler*, 263 U.S. 22, 24, *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, and *Brown v. Western R. Co.*, 338 U.S. 294, stated that the assertion of these Federal rights "is not to be defeated under the name of local practice." Green, *Jury Trial and Mr. Justice Black*, 65 Yale L.J. 482 (1956). But see: *Bowman v. Illinois Central R. Co.*, 9 Ill. App.2d 182. Cf. *Minneapolis & St. Louis R.R. v. Bombolis* (1916), 241 U.S. 211, 36 S.Ct. 595.

At worst, the Supreme Court of Virginia should have remanded the parties back to the Trial Court to determine whether or not a new jury trial should be granted in the light of its view of the evidence. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 215, 216 (1947); *Virginian Ry. Co. v. Armentrout* (Fourth Circuit), 166 F.2d 400, 409.

The assertion of claims under the Federal Employers' Liability Act represents a not insignificant portion of the civil judicial workload in the U.S. District Courts. Pursuant to 45 U.S.C. §56, injured employees have the choice of bringing FELA cases in either the State or Federal Court. Unless the applicable conflicts principle for reviewing FELA judgments in State appellate tribunals are emphatically stated with black letter clarity to be those of the Federal judiciary as heretofore enunciated by this Court (e.g., *Gallick v. B. & O.*, supra, 114), the desirable result of

dispersing these cases throughout both judicial systems in accordance with congressional intent (45 U.S.C. §56), will be impeded and the Federal courts will definitely become the forum of choice in FELA cases. This presents a serious problem to many U. S. District Courts, whose judicial time is prioritized by the rigid requirements of the Speedy Trial Act of 1974 (P.L. 93-619).

New York counsel for petitioner, a regional counsel designated by the United Transportation Union, has, for example, currently on file, thirty-four actions brought under the FELA in the United States District Courts and none in the State Court system of New York, where the Appellate Division notoriously engages in fact-finding at the appellate level. 176 New York Law Journal 82 (October 27, 1976) p. 1, col. 6.

What is needed in a firm statement of accountability to federal principles in FELA cases processed through the state court systems. This can be accomplished without an independent appraisal of the evidence in this particular case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARNOLD B. ELKIND
Attorney for Petitioner

Footnote 1 (pp. 4, 5, 7)

Supreme Court Cases Vindicating Jury Determinations (1943-1968)

4TH PART OF APPENDIX

Tennant v. Peoria & P.U.R. Co., 321 U.S. 29.
Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574.
Blair v. Baltimore & O. R. Co., 323 U.S. 600.
Keeton v. Thompson, 326 U.S. 689.
Lavender v. Kurn, 327 U.S. 645.
Cogswell v. Chicago & M.R. Co., 328 U.S. 820.
Jesionowski v. Boston & M.R. Co., 329 U.S. 452.
Ellis v. Union P. R. Co., 329 U.S. 649.
Pauly v. McCarthy, 330 U.S. 802.
Lillie v. Thompson, 332 U.S. 459.
Anderson v. Atchison, T. & S.F. R. Co., 333 U.S. 821.
Eubanks v. Thompson, 334 U.S. 854.
Penn v. Chicago & N.W. R. Co., 335 U.S. 849.
Coray v. Southern P.R. Co., 335 U.S. 807.
Wilkerson v. McCarthy, 336 U.S. 53.
Hill v. Atlantic Coast Line R. Co., 336 U.S. 911.
Urie v. Thompson, 337 U.S. 163.
Brown v. Western R. Co., 338 U.S. 294.
Carter v. Atlantic & St. A.B.R. Co., 338 U.S. 430.
Stone v. New York, C. & St. L.R. Co., 344 U.S. 407.
Harsh v. Illinois Terminal R. Co., 348 U.S. 940.
Smalls v. Atlantic Coast Line R. Co., 348 U.S. 946.
O'Neill v. Baltimore & Ohio R. Co., 348 U.S. 956.
Neese v. Southern R. Co., 350 U.S. 77.
Anderson v. Atlantic Coast Line R. Co., 350 U.S. 807.
Strickland v. Seaboard Air Line R. Co., 350 U.S. 893.
Cahill v. New York, N.H. & H.R. Co., 350 U.S. 898.
Rogers v. Missouri Pacific R. Co., 352 U.S. 500.

*Supreme Court Cases Vindicating Jury Determinations**Webb v. Illinois Cent. R. Co.*, 352 U.S. 512.**Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360.**Futrelle v. Atlantic Coast Line R. Co.*, 353 U.S. 920.*Shaw v. Atlantic Coast Line R. Co., et al.*, 353 U.S. 920.**Deen v. Gulf, C. & S. F.R. Co.*, 353 U.S. 925.*Thomson v. Texas & Pacific R. Co.*, 353 U.S. 926.**McBride v. Toledo Terminal R. Co.*, 354 U.S. 517.*Ringhiser v. Chesapeake & O.R. Co.*, 354 U.S. 901.**Gibson v. Thompson*, 355 U.S. 18.**Stinson v. Atlantic Coast Line R. Co.*, 355 U.S. 62.**Honeycut v. Wabash R. Co.*, 355 U.S. 424.**Ferguson v. St. Louis-San Francisco R. Co.*, 356 U.S. 41.**Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326.**Moore v. Terminal R. Asso.*, 358 U.S. 31.**Baker v. Texas & P.R. Co.*, 359 U.S. 227.**Conner v. Butler*, 361 U.S. 29.**Harris v. Pennsylvania R. Co.*, 361 U.S. 15.**Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108.**Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248.**Basham v. Pennsylvania R. Co.*, 372 U.S. 699.**Dennis v. Denver & Rio Grande Western R. Co.*, 375 U.S. 208.**Davis v. Baltimore & Ohio R. Co.*, 379 U.S. 671.*Grunenthal v. Long Island R. Co.*, 393 U.S. 156.

APPENDIX

* Certiorari directed to State Courts since *Rogers v. Missouri Pacific*.

Decision of Judge Sheffield on Post Verdict Motions

This Court denies all of the Defendant's post verdict motions and Orders that judgment be entered on the jury's verdict herein. • • •

DISCUSSION

- I. Whether The Trial Court Properly Submitted To The Jury And [To] The Jury Properly Decided, The Questions Of The Primary Negligence Of The Defendant, C & O Railway Company, And The Contributory Negligence Of The Plaintiff, Mack B. Richmond.

FACTS

On February 19, 1973, Plaintiff (Richmond) was the conductor of a crew, which was in the process of placing railroad cars in various railroad yards, between Hinton, West Virginia and Clifton Ford, Virginia, and was at or about the time of his alleged injury working on Defendant's freight train. There were two cars on the train which were to be left in Ronceverte, West Virginia where the accident occurred. The crew consisted of Finley Bennett, a brakeman; David Lilly, a brakeman; Charles Harrah, the engineer, and the plaintiff, the conductor.

The train proceeded to the Ronceverte yard and moved past the point of the plaintiff's injury, placed a car at Allied Mills and returned east again to the point where the plaintiff was injured on the passing track (Tr. p. 91).

There were three sets of tracks at the point in the Ronceverte yard where the accident occurred. Plaintiff's train was proceeding on the passing track. The main track was to the left of the passing track and the "fill out" track was to the right of the passing track.

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The train at the time of the plaintiff's injury, consisted of a car followed by the engine, then a caboose, and then one car which was located on the west end (rear end) of the caboose. (Bennett Depositions, 415).

Plaintiff was riding on the brake platform on the front or east end of the lead car. Lilly was riding on the side step on the south side of the engine, just in front of Harrah, the engineer. Harrah was riding in the caboose on the side of the south side of the caboose, next to the fill out track. Bennett was riding in the caboose on the west side.

It was approximately a quarter mile from the point where the plaintiff released the handbrake on the Allied car and the point where the accident occurred. The plaintiff remained on the brake platform on the front of the car on which he was riding because of the distance the train would travel to the next switching point and because he had a platform to stand on on the front of the car which was approximately a foot wide and 24 to 30 inches long. (Tr. p. 98).

The train was moving at 8 m.p.h. and as the train moved across the Ronceverte yard to a point where it approached a crosswalk, plaintiff decided to get down from the brake platform on the front of the train, move to the side ladder of the car so that (he testified), he could better signal the engineer as he could not adequately signal to the engineer at the crosswalk from the brake platform at the front of the car, (Tr. p. 98-99), and to get himself into a position so as to get off the car in order for him to receive permission from the dispatcher to cross the main line track. (Tr. p. 98-99).

Just as plaintiff reached the side ladder on the car, his right shoulder came into contact with the northwest corner of a covered hopper car which was parked on the fill-out

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track. Plaintiff was knocked from the grab iron and fell to the ground in between the passing track on which his car had been traversing and the adjacent fill-out track.

Measurements taken by the C & O on the day after the the plaintiff's injury indicated that there was 21½ inches between the car on which Richmond was riding and the hopper car. All witnesses, who testified on the point agreed that the clearance was "close" (Tr. p. 324). There is also evidence that there was not enough room for a man riding on the side of the car (as was plaintiff), to pass the hopper car without injury. There were no signs indicating the closeness of the clearance between the cars and it is uncontroverted that someone from the defendant had positioned the hopper car on the fill-out track prior to the plaintiff's injury.

There was also a protruding metal strip from the hopper car, (Tr. p. 272), and the hopper car measured 3¾ inches wider than a normal car. (Tr. p. 310).

It is uncontroverted that the tracks in the yard at or about the point of the plaintiff's injury had not been altered to accommodate the hopper car since its development.

The condition of the tracks in the yard "were not good" and plaintiff testified that the car that he was riding on swayed and rocked backwards and forwards as it passed over the tracks because of low places in the track bed. (Tr. p. 102, 105, 106 and 107). Another witness, Lilly, testified that he saw no rocking of the car on which Richmond was riding and could not say that the car's rocking had anything to do with the accident. (Lilly Depositions, p. 21)

Plaintiff was positioned on the front of the car and was charged under the rules of the defendant with the duty to

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keep a proper lookout. Plaintiff admitted, however, that he rode the east end of the car from Allied Mills to the point of his injury, on the brake platform in a position where he couldn't be seen by the brakeman, Lilly, and could not give the engineer, Harrah, signals in accordance with company rules which required that when shoving a car, a man be placed on the leading end of that car for purposes of being able to give signals to the engineer. That, although the plaintiff was charged with the duty of looking out for obstructions, as he rode on the front of the car, he failed to see the obstruction caused by the hopper car. (Tr. p. 151-155). Plaintiff was not warned of any cars on the adjacent fill-out tracks (Tr. p. 325) and had not known the defendant to place cars on the fill-out track before (Tr. p. 109, 110). None of the plaintiff's co-employees warned plaintiff of the closeness of the hopper car although company rules required all members of the crew to keep a lookout for close clearances (Tr. p. 113). Lilly saw the cars there, but testified that he did not know the clearance was so close (Lilly depositions, p. 27) and admitted that had he realized the clearance was as close as it was, he would have yelled to Richmond. (*Id.* at p. 28)

The rear brakeman did not apply the emergency brake before the plaintiff was struck, even though he was looking in the direction that the train was proceeding (Tr. p. 115, 116). The engineer did not see anything until Richmond was struck by the hopper car. (Harrah dep. p. 8)

Plaintiff filed its Motion For Judgment in this Court seeking compensatory damages in the amount of \$250,000.00 for physical pain, mental anguish, past and future medical expenses, loss of income, and permanent injury pursuant to the Federal Employers Liability Act (45 U.S.C.A., Chap. 2, Secs. 51-60), as amended August 11,

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1939; (F.C.L.A.)^{*} and The Safety Appliance Act (45 U.S. C.A. Chap. 1, Sec. 1-16). Plaintiff alleged, *inter alia*, that the defendant, through its officers, agents, and employees negligently and carelessly failed to supply plaintiff with a safe place to work; failed to provide it with adequate and effective assistance; and failed to maintain efficient and safe equipment.

A. Issues Of Primary Negligence And Of Contributory Negligence Were Properly Submitted To, And Decided By The Jury

Defendant first contends, *inter alia*, that there was not sufficient legal and credible evidence in the record to warrant the court's submission of the case to the jury on the joint issues of the defendants' primary negligence and the plaintiff's contributory negligence, and that having thus submitted the issues to the jury, the jury improperly decided these issues in favor of the plaintiff. This Court rejects this contention as there is legally sufficient evidence in the record as to both primary and contributory negligence to warrant, and indeed, to require the submission of both issues to the jury.

Under familiar principals, it is the duty of this Court to affirm the verdict of a jury on its findings of fact on conflicting material evidence, and this Court cannot set aside a jury verdict unless it is contrary to the weight and preponderance of the evidence. A jury verdict will not be disturbed when it is supported by credible evidence or if reasonable men may differ as to the inferences to be drawn from the evidence. But when fairminded men can reach only one conclusion from the facts in a jury case, the question becomes one of law to be decided by the court. This

^{*} Sic.

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is not such a case, as there is in the instant case credible evidence in the record to support the jury's verdict.

Here, the evidence, and the reasonable inferences flowing therefrom was in significant conflict as to the primary negligence of the defendant and the contributory negligence of the plaintiff and the case was properly submitted to the jury. There was sufficient credible evidence in the record upon any of which the jury could properly reach the decision for the plaintiff that it did. In this regard, it is not necessary at this juncture that this court catalogue, review and discuss all of the relevant evidence in the case which would warrant the jury verdict but only to indicate any of which would so warrant the jury's determination of in this case. This is a case brought under the Federal Employers Liability Act and as such negligence on the part of the plaintiff unless it is the sole negligence in the case is not a bar to his recovery, but only in such instance mitigates as to the amount of plaintiff's recovery. It is therefore essential that the court also review the question of whether the issue of contributory negligence of the plaintiff was also properly submitted to the jury.

The defendant argues *inter alia*, that the record does not contain "... proof that the Chesapeake and Ohio Railroad failed to exercise reasonable care in any respect to protect the plaintiff's safety. That plaintiff's failure to exercise reasonable care for his own safety was the sole cause appearing in the record of his injury." (Emphasis supplied, Defendant's Memo. of Law, p. 1)

The first pivotal question is what duty owed to the plaintiff on the part of the defendant does the record reveal that the jury could legally find by a preponderance of the evidence was breached by the defendant's action or inaction, which proximately caused the injuries and losses as alleged

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by the plaintiff and as proved in the record by a preponderance of the evidence?

The first act or omission constituting contributory negligence on the part of the plaintiff relied upon by the defendant as being the "sole reason appearing in the record as the cause of his [plaintiff's] injury, is plaintiff's breach of Operating Rule 103-A that required an employee to be on the leading end of a car being shoved. Defendant argues that the plaintiff "... knew that the purpose of that rule was to be sure that such person was 'in position to be clearly seen and to give signals' (Tr. p. 152-153)." (Defendant's Memo. of Law, p. 2)

Defendant further argues that plaintiff, although likewise familiar with the purpose of Safety Rule 182,¹ that requires trainmen to maintain lookout in the direction of movement to avoid contact with cars on adjacent tracks, failed to maintain a proper lookout and therefore committed his second act of negligence which constituted the sole cause of his injury. Defendant argues that this is especially so since "Richmond, [the plaintiff], conceded that, being the first on the end of the pushed car, he was the person in the movement that he was there making that was 'primarily charged with keeping a lookout forward'; 'the first eyes.' (Tr. p. 157, 159, 228-229)." (Defendant's Memo. of Law, *supra*) Defendant argues that the evidence established that plaintiff was negligent in that "Richmond rode the approximately one-quarter mile from Allied Mills on the brake platform where he could not be seen to give signals, in violation of Rule 103-A until the accident oc-

¹ Safety Rule No. 182 provides: "Employees will maintain a lookout in the direction of movement to avoid coming in contact with structures or obstructions alongside of track or with cars, locomotives or trains on adjacent track."

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curred. (Tr. p. 151-153, 96-101)." (Defendant's Memo. of Law, *supra*).

The defendant then at pages 2-4 of its Memorandum of Law sets forth *in hoc verba* various excerpts of the plaintiff's testimony in order to establish the plaintiff's various movements, which defendant contends were in violation of Operating Rule 103-A and Safety Rule 182, to establish that the plaintiff was so positioned that he could not be clearly seen and to give effective signals as required by Rule 103-A and that he did not keep a proper lookout forward as required by Safety Rule 182, all of which according to the defendant were the sole causes of the plaintiff's injuries. (Defendant's Memorandum of Law, p. 2-6)

Defendant further argues that the evidence supports the conclusion that plaintiff solely caused his injuries because the plaintiff admitted that he was on the front of the car and that he did not see the hopper car before his injury, which was parked on the adjacent fill-out track and which came into contact with his body as the car on which plaintiff was riding passed the parked hopper car, and offered no explanation as to why he did not see it (Tr. p. 155) and further admitted that it was his job while positioned on the front of the car to look ahead for obstructions on nearby tracks.

Defendant further argues that the evidence establishes that the hopper car which was parked on the adjacent track, which came into contact with the plaintiff's body "... was not only open and obvious generally but was necessarily so to Richmond in the exercise of his express duty to be alert for, to be on the lookout for, and to become aware of its presence." (Defendant's Memo. of Law, p. 5) Setting forth the following excerpt of plaintiff's testimony:

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Q. In the position as you came around as you have described it, you would have had to have your back to the direction that you were going, correct?

A. *Not necessarily*, no sir.²

Q. Well, did you have your back in the direction you were going?

A. No, sir, *I don't think* I had my back in the direction I was going at any time.

Q. Then why didn't you see the cars?

A. Now I can't answer that.

Q. You just failed to see?

A. I didn't see them, no sir. As I answered in my statement, first I saw it was when the car just looked like it was in my face." (Tr. 176, *Italics Ours*) (Defendant's Memo. of Law, p. 5)

• • •

Defendant further argues that the evidence shows that plaintiff had two opportunities to view the car which his body came into contact with. The defendant argues that the evidence established that the train on which Richmond was riding passed "... right by the cars in the fill-out tract" [where the hopper car was parked] when his train first came into Ronceverte and he went to the depot for instructions (Tr. 173). His testimony was that he then

² "His first and only statement (Tr. 117) as to how he 'came around' from the brake platform indicates that his back must have been turned to the direction of movement. He was moving eastward on the front of the car. The car that he struck was on the track to his right. He had his left hand on the top rail of the car. He caught the side ladder with his 'right hand and stepped around to the left.' This appears to place him cross-handed with his back to the direction of movement and to the cars to the right of that movement in order to strike his right shoulder." (Defendant's Memo. of Law, p. 5)

• *Sic.*

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came right back by the same cars again on his way to Allied Mills (Tr. 174)," and that he knew the cars were on the fill-out track. (Tr. 174) (See also Defendant's Memorandum of Law, p. 5-6).

In reference to primary negligence on the part of the defendant, the defendant argues that the record does not contain any proof that the defendant failed to exercise reasonable care in any respect.

As to the suggestion by the plaintiff that the defendant was primarily negligent in that the other crew members-employees of the defendant had a duty to warn the plaintiff, which they breached, proximately causing the plaintiff's injuries, the defendant argues that there was no such duty to warn plaintiff. That it was plaintiff's specific duty to lookout for obstructions; the obstruction here was open and obvious.

As to the suggestion by the plaintiff that the defendant was further primarily negligent in that the roadbed in the yard was poorly maintained and that cars rocked when passing over those tracks, the defendant counters by urging that "the witness Lilly said he saw no rocking of the car Richmond was on and could not say that car rocking had anything to do with the accident (Lilly, dep. p. 21)" (Defendant's Memorandum of Law, p. 6).

Lastly, as to the plaintiff's argument that the defendant was primarily negligent in that clearance between the hopper car which struck plaintiff and the car on which plaintiff was riding at the time of plaintiff's injury was shown to have been $21\frac{1}{2}$ inches and therefore so close as to constitute negligence; the defendant urges that the mere fact of close clearance standing alone does not establish negligent causal connection as a contributing factor to Richmond's

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admitted failure to perform his specific duty. (Defendant's Memorandum of Law, p. 6).

There is also ample evidence in the record upon which the jury could reasonably and legally conclude that there was also a protruding metal strip on the hopper car which came into contact with the plaintiff, (Tr. p. 272); that the hopper car was $3\frac{3}{4}$ inches wider than a normal car (Tr. p. 310) and that the tracks in the yard had not been altered since the development and use of the larger hopper car. (Tr. p. 323)

There is a conflict in the evidence as to whether the car on which plaintiff was riding swayed or not as to the general condition of the tracks in the yard. Plaintiff testified that the tracks in the yard were not good, (Tr. p. 102), and that the car on which he was riding swayed and rocked backwards and forwards as it passed over the track because of low places in the track (Tr. p. 105-107). The witness, Lilly, on the other hand, testified that he saw no rocking of the car on which plaintiff was riding and he could not say that car's rocking had anything to do with the accident. (Lilly dep. p. 21).

There is competent evidence in the record upon which the jury could properly find that plaintiff had been warned of the existence of any cars on the fill-out tracks (Tr. p. 325) and that the plaintiff had not seen the defendant's cars stored on the fill-out tracks before (Tr. p. 109-110).

It is undisputed that none of the plaintiff's fellow members warned plaintiff although all members of the crew were required to keep a lookout for close clearances (Tr. p. 113). Plaintiff saw the cars, and his fellow employee, Lilly, also saw the cars parked on the track, however, Lilly stated that he did not know the clearance between

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the cars was so close (Lilly dep. p. 27). There is evidence in the record that Lilly, however, admitted that if he had realized the closeness of the cars, he would have yelled to Richmond (Lilly dep. p. 28). The jury could reasonably find, however, that Richmond was never warned even by the engineer who was operating the train and he did not see the obstruction until Richmond was injured (Harrah dep. p. 8).

The jury could also properly find on the evidence in this case that the rear brakeman did not apply the emergency brake even though he was looking in the direction that the train was proceeding (Tr. p. 115-116).

In spite of the foregoing testimony and other evidence in the record, the defendant argues that it was error for this Court to submit to the jury for determination the question of the defendant's primary negligence and that once submitted, the jury improperly reached its decision.

The question of the quantum of evidence in a given case that is sufficient to warrant its submission to a jury presents no novel or new question. Further, the test has been enunciated in many cases pertaining to actions brought pursuant to the Federal Employers' Liability Act. For example, this question was presented to the Supreme Court of the United States in *Webb v. Illinois Railroad Company*, 352 U.S. 512 (1957), wherein the Court stated in pertinent part that:

• • •

In passing upon whether there is sufficient evidence to submit an issue to the jury, we need only to look to the evidence and reasonable inferences which tend to support the case of a litigant against whom a pre-emptory instruction has been given.

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Subsequently, the Supreme Court of the United States had occasion to again enunciate the test in *Rogers v. Pacific R. Co.*, 352 U.S. 500 (1957) wherein the Court stated in pertinent part:

• • •

Under the Statute [Federal Employer's Liability Act], the test of a jury case is simply whether the proofs justify with reason the conclusion that employer's negligence played *any part, even the slightest, in producing* the injury or death for which the damages are sought . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry *whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death*. Judges are to fix their sights primarily to make that appraisal, and, if that test is met, are bound to find that a case for the jury is made out, whether or not the evidence allowed the jury a choice of other probabilities. (*Id.* at 506-507) (Emphasis supplied)

• • •

It is thus clear that the test to be applied here is whether evidence, and the reasonable inferences to be drawn therefrom, leads one reasonably to the conclusion that negligence of the employer (the defendant) played any part at all in the injury complained by the plaintiff, for if it did then this was a proper case for the jury.

First, clearly there was evidence offered on both sides as to the closeness of the cars and tracks at or near the point of the plaintiff's injury. The evidence on this point is not in dispute that the clearance between the car on which the plaintiff was riding and the hopper car with which his body came into contact with, which was located

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at or near the point of the plaintiff's injury was 21½ inches. (Lilly dep. p. 26-27) (Bennett dep. p. 7)

There was further evidence that the hopper car was 3¾ inches wider than a normal freight car (Tr. p. 310), and that the defendant's tracks located at or about the point of the plaintiff's injuries had not been altered or changed since the development and utilization of the hopper cars. (Tr. p. 323).

It is not contended by the defendant that it did not have a duty to maintain its tracks and cars in such proximity to each other as not to negligently injure the plaintiff. Defendant, inferentially admits the duty, however, in its own argument on the point (stated in its Memorandum of Law) defendant states that "The mere fact of close clearance standing alone does not establish negligent causal connection as a contributing factor to Richmond's admitted failure to perform his specific duty." (*Id.* at p. 6)

There is ample authority for the proposition that it is a proper issue for the jury as to whether the railroad was negligent in maintaining its cars and tracks in close proximity to each other, where such inquiry is relevant to issues raised in this case. See: *Chesapeake and O. Ry. Co. v. Mears*, 64 F.2d 295 (4th Cir. 1933); *Chicago, St. P.M. and O.R. Co. v. Arnold*, 160 F.2d 1002 (8th Cir. 1947); *Bartlebaugh v. Penn. Railroad Company*, 78 N.E.2d 410, *Texas and N.O.R. Co. v. Warden*, 49 S.W. 29, 486. See also 50 A.L.R.2d 674, "Duty Of The Railroad Company Toward Employees With Respect To Close Clearance Of Objects Alongside Track."

In the instant case, it clearly was proper for the jury to determine whether the clearance between the cars was so close as to constitute negligence on the part of the defendant, Railroad. The test enunciated by the Supreme Court

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in *Rogers, supra*, that the employer's negligence play "any part even the slightest, in producing the injury or death for which damages are sought" is clearly met in the instant case.

The resolution of the question of close clearance alone would justify the submission of the case to the jury, however, there is more.

There is competent evidence in the record that there was no warning given to the plaintiff as to the existence of the close clearance of the tracks and cars. It is uncontroverted that none of plaintiff's co-workers warned plaintiff although all crew members, including the plaintiff, were required to keep a good lookout for close clearances among other things and conditions. (Tr. p. 113). There is compelling evidence that Harrah, the engineer on the train on which plaintiff was riding, did not see anything until after plaintiff was injured. (Harrah dep. p. 8). There is further evidence that Lilly, a brakeman on plaintiff's train, saw the cars in question, but did not know the clearance was as close as it actually was and stated that he would have yelled to plaintiff if he had realized at the time that the clearance was as close as it actually turned out to be. There is even further evidence that the defendant had knowledge of the close clearance as the cars had been placed there for several days before the accident, but no one in the Ronceverte yard warned plaintiff or his crew of the close clearance. (Lilly Depositions, p. 27-28).

The defendant argues that, "There was no duty on the part of anybody to warn Richmond [of the close clearance]. It was his specific duty to look out for and to see the obstruction if any existed. The situation was open and obvious." (Defendant's Memo. of Law, p. 6).

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There is ample authority to the effect that the defendant Railroad has a duty to warn an employee of a danger, and that whether in a given case the warning is required will depend upon the facts of each individual case and thus each case has to stand on its own individual factual situation. For jurisdictions holding that there is a duty to warn an employee of danger, see: *Evans v. Atchison, T. and S.F. Ry.*, 131 S.W.2d 604 (1939); *Sprankle v. Thompson*, 243 S.E.2d 510; *Starck v. Chicago and N.W. Ry. Co.*, 123 N.E.2d 826 (1955); *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943).

The defendant, however, argues, without the citation of authority, that "There was no duty on the part of anybody to warn Richmond. It was his specific duty to look out for and to see the obstruction if any existed." (Defendant's Memorandum of Law, p. 6).

This Court adopts the position that the defendant had a duty to warn its employees of danger. The fact that the plaintiff also had a duty to look out for obstructions and the fact that the obstruction may have been found by the jury to have been open and obvious, as argued by the defendant does not negate the existence of the duty to warn on the part of the defendant, however, there are facts and circumstances that the jury may properly take into consideration in deciding how much of a warning the defendant was required to give under the particular circumstances of this case. The duty itself, however, existed and it was a proper question for the jury to determine whether the defendant, under the circumstances of this case upheld its duty.

Again, the test of *Rogers, infra*, has been met, for the jury could find upon the evidence in the record and the reasonable inferences stemming therefrom that the defen-

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dant breached its duty to warn, and that its failure to do so was negligence and that that negligence "played any part, even the slightest, in producing the [plaintiff's] injury." (*Rogers, Id.* at 506-507)

Even, assuming without deciding, that plaintiff was negligent himself in not keeping a proper lookout as he was charged with doing in defendant's Operating Rule 103-A (Tr. p. 152-153), if the defendant was negligent and if that negligence under the test of *Rogers, supra*, played any part, even the slightest in producing plaintiff's injury, then it was proper to submit the case to the jury, and this Court so holds that it was proper.

There was further competent and conflicting evidence admitted into the record of this case concerning the condition of the roadbed in the Ronceverte yard at or about the place where the plaintiff was injured, which further mandated the submission of this case to the jury on the question of the defendant's primary negligence.

The witness Lilly, a brakeman, testified that he saw no rocking of the car on which Richmond was riding and he could not say that the car's rocking played any part in the causation of the plaintiff's injury or the accident (Lilly dep. p. 32).

The plaintiff on the other hand, testified concerning the condition of the tracks in the particular area where the accident happened that "... the track condition through the whole Ronceverte area is in pretty bad shape ..." and further, that there hadn't "... been any repair on it [the fill-out track], in my 29 years, outside of maybe if there is a broken rail or something, I don't know, but I never recall of the fill-out track being serviced, any ballast rock or anything being put on it." (Tr. p. 102). Plaintiff further testified that the car on which he was riding

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swayed and rocked backwards and forwards as it passed over the tracks at or about the place where the car on which he was riding came abreast of the parked hopper car, because of low places in the tracks (Tr. p. 105-107).

The defendant, on this point, states that "The witness Lilly said he saw no rocking of the car Richmond was on and could not say that car rocking had anything to do with the accident." (Lilly dep. p. 2) (Defendant's Memorandum of Law, p. 6). Clearly, this conflicting evidence presents a classical jury question and this Court was compelled to submit the case to the jury on this issue alone. It was for the jury to determine whether the defendant had in fact maintained its roadbed properly, and if not, whether such failure proximately contributed or caused the plaintiff's injury. The test set forth in *Rogers, supra*, that the "... proofs justify with reason the conclusion that employer's negligence played any part, even the slightest, in producing the [plaintiff's] injury is manifestly met on this issue and this issue was properly submitted to the jury.

• • •
CONCLUSION

For the above reasons, it is held that the defendant's • • • Motions To Strike The Plaintiff's Evidence And To Enter Judgment For The Defendant • • • are denied and judgment is Ordered entered on the jury's verdict herein.

A copy of the Court's Order entered on today's date is attached.

Very truly yours,

/s/ James Edward Sheffield
James Edward Sheffield

• • •

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Present: All the Justices

Record No. 750956-A

OPINION BY JUSTICE ALBERTIS S. HARRISON, JR.

Richmond, Virginia, September 2, 1976

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

—v.—

MACK B. RICHMOND

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND,
DIVISION I

James Edward Sheffield, *Judge*

This appeal by The Chesapeake and Ohio Railway Company is from a final judgment rendered against it in an action brought under the Federal Employers' Liability Act by one of its employees, Mack B. Richmond. Appellee effected a recovery for personal injuries suffered in an accident that occurred while he was performing his duties. The dispositive issue is whether the C & O was guilty of negligence that contributed in whole or in part to cause the injuries.

On February 19, 1973, Richmond was the conductor in charge of a local freight train engaged in switching operations in the C & O's Ronceverte, West Virginia yard. The most southerly track in the yard was designated as the "fill-out track", on which was located a covered hopper car, one of the cars involved in this case. The next

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track northward was designated as "the passing track", on which Richmond and his crew were proceeding easterly at the time he was injured. The next tracks to the north were the two main lines with which we are not concerned.

Richmond's train arrived in Ronceverte from the west and proceeded easterly on the passing track to the vicinity of the freight depot where Richmond received instructions concerning the switching movement of cars in the yard. The instructions called for the train to pick up a certain freight or boxcar parked on the fill-out track on the south side of the yard, move the car eastward and spot it at the Martin and Jones Hardware Company, located on the north side of the yard. The movement necessitated the permission of the station operator since it required the train to cross the main line tracks.

The train crew consisted of Richmond; Charles D. Harrah, the engineer; and two brakemen, David H. Lilly and Finley E. Bennett. The train proceeded to pick up the designated boxcar from the fill-out track and began "shoving" it on the passing track toward its destination at the hardware company. The train then consisted of that boxcar, which was the first or lead car, followed by the engine, a caboose and another boxcar. Richmond, who was riding on the brake platform of the east or front end of the boxcar being pushed, had released the car's brakes. Harrah was sitting on the seatbox on the right side of the engine. Lilly was on the right front side step of the engine. Bennett was riding on the west end of the caboose. The train was moving at about eight mph. Testimony indicated that the lead boxcar was of a standard size, 50 feet 6 1/16th inches in length, 10 feet 4 1/2 inches in width and 15 feet in height.

The brakes of the boxcar are controlled by a rod which extends from the braking mechanism to a brake wheel

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near the top of the car. At a point in front of and attached to the boxcar, and located about three to four feet from the top, is the brake platform described as being six inches in width by twenty-four inches in length. A trainman stands on this platform to have access to the brake wheel and to be in position to operate the brakes. Attached to the left front of the boxcar, as one faces it, is a ladder by which access is gained to the brake platform and to the top front of the car. To the left of this ladder and just around the left corner of the boxcar is another ladder which reaches from the top of the car to a step, or "stirrup", located between the bottom of the car and the bed of the railroad. The grab irons of this ladder project about 2 3/4 inches from the side of the car. Trainmen stand on the stirrup of this ladder during switching operations so that they may be clearly visible when giving signals to the engineer.

The covered hopper car, which was involved in the accident, is 52 feet 1/2 inch long, 10 feet 7 3/4 inches wide, and 15 feet 1 inch high. A welded metal strip eight inches wide extends one-fourth inch from the center of the car on the north side.

The clearance between the corner of the moving boxcar on the passing track and the corner of the stationary hopper car on the fill-out track was measured to be 21 1/2 inches at the point of the accident and at a height of eight feet from the rail.

Richmond, riding on the brake platform on the front end of the boxcar being shoved eastward on the passing track, moved around the southeast corner of the car from the brake platform to the side ladder. In the course of making this movement he struck the northwest corner of the hopper car and injured his right shoulder. The accident was wit-

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nessed by the two brakemen. Bennett's version is as follows:

"Well, we were watching, all of us, I suppose, at least I was watching the eastbound movement there. As we approached the car, the covered hopper in the fill-out track, Mr. Richmond moved from the brake step or attempted to move from the brake step to the side ladder. As the two cars met, just about the time he came from the brake step around to the side ladder, it caught him between the two cars."

Lilly testified:

"Mack [Richmond], as we were shoving eastward through the passing siding and approaching those covered hoppers that were on the fill-out track, stepped around from the end of the car, around onto the side ladder.

.

"Just as he got around on the side ladder, that is when his right shoulder struck the northwest corner of the westernmost covered hopper sitting on the passing siding, and it knocked him off.

.

"Just the instant—just about the time he came around, just almost instantaneously when he struck the car, of course I yelled to the engineer and he went into emergency.

.

"He hit the corner of the covered hopper. . . ."

Richmond, who said that he never saw the hopper car, testified as follows:

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"Well, I was riding on the east end of the car on the brake platform, as well as I remember, with my left hand on the rail or whatever you want to call it, on the top of the car. Whenever I got up to make my move to come down the side ladder I caught it with my right hand and stepped around to the left, and that's the last I remember. It just looked to me like this car just come right up in my face, and that was it."

In his report of the accident, made a few days thereafter, Richmond said that he "[w]as riding on leading end of C & O 21354 boxcar on brake platform. Swung around to side of car and was struck by B & O 602154 standing in fill-out track next to passing side we were on".

This action was brought under the Federal Employers' Liability Act, and the C & O is liable to Richmond if his injuries were caused in whole or in part by the railroad's negligence. *Seaboard Coast Line Railroad v. Ward*, 214 Va. 543, 202 S.E. 2d 877 (1974). Contributory negligence is not a defense. It only mitigates damages. *Norfolk Southern Ry. Co. v. Rayburn*, 213 Va. 812, 195 S.E. 2d 860 (1973). The C & O cannot defend on the ground of assumption of risk for such defense has been abolished. 45 U.S.C. §54 (1964).^{*} Richmond, having received a verdict by the jury, which has the approval of the trial judge, is entitled to have the evidence viewed by us in the light most favorable to him. *Riley v. Harris*, 211 Va. 359, 177 S.E.2d 630 (1970). Here we need look only to the evidence and reasonable inferences which tend to support appellee's case. *Wilkerson v. McCarthy*, 336 U.S. 53 (1949).

Counsel for Richmond cites numerous cases, including *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-07 (1957), where, in reviewing the sufficiency of the evidence

^{*} Sic.

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in a Federal Employers' Liability case, the Supreme Court stated:

"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence. [Footnotes omitted]."

The C & O concedes that *Rogers* makes it clear that under the FELA the test of a jury case is whether there is proof that negligence by the employer played even the slightest causative part in producing the injury involved. However, appellant says there is no intimation in *Rogers*, or in any other case, that causative negligence of the employer has been abolished as a prerequisite to recovery. It further contends that the Act does not make the employer an insurer. It cites *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 578 (1951), where the Court said, "Speculation cannot supply the place of proof", and *Brady v.*

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Southern Ry. Co., 320 U.S. 476, 479-80 (1943), where it was held:

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. [cases cited] When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. [cases cited]."

The testimony is remarkably free of conflict. Clearly Richmond attempted to transfer from the brake platform to the side ladder of the boxcar at the very instant the southeast corner of the boxcar reached the northwest corner of the hopper car. The maneuver which he made, while not unusual, was difficult at best. In order for Richmond to move from the brake platform to the side ladder it was necessary that he first cross over to the front ladder of the boxcar, and then from there swing or move around the corner of the car to the side ladder. Before making this move Richmond had been riding at a place on the car where he should not have been. The railroad's operating Rule 103A provides:

"When shoving tracks . . . a man must be stationed on the leading car . . . in position to be clearly seen to give signals, unless the movement is otherwise protected."

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The movement was not otherwise protected. The only trainman who had a clear view to the front of the boxcar, and both to the left front and right front thereof, was Richmond. Rule 103A envisions that a trainman will be standing on the stirrup of the side ladder of the lead car where any signal given by him will be clearly visible to the engineer. Richmond was not on his station and could not be clearly seen by the engineer. In fact the engineer knew only that "he was somewhere in the vicinity of the car".

Richmond's explanation that the car was to be pushed a good distance, and that it was more comfortable to ride on the brake platform than to ride holding to a ladder with his feet in the stirrup, does not excuse his violation of the rule. There was no other crewman on the train in a position to protect the movement of the train. Lilly was on the right front steps of the engine immediately below the engineer and obviously he could not see to the left front of the train because the front of the engine and the boxcar obstructed his view. Neither could Bennett see to the left front of the train for he was on the right side of the caboose and even more remote from the front of the boxcar.

Richmond, as the conductor, was the trainman primarily responsible for the movement of the train and the safety of the crew and others. He failed to maintain a proper lookout in the direction in which the train was moving; therefore, he was in violation of Rule 182 which provides:

"Employees will maintain a lookout in the direction of movement to avoid coming in contact with structures or obstructions alongside of track, or with cars, locomotives, or trains on adjacent track. When vision is obscured, or location is indefinite, they will keep in the clear."

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Richmond admitted that he never saw the hopper car, notwithstanding there was no obstruction in front of him, and the car was in a fixed position and clearly visible. The hopper car was seen by other members of the crew. They had no reason to suspect that Richmond had not seen the car and was not aware of its presence on the adjacent track. Richmond's train had passed the car on two previous occasions that morning, prior to the accident.

One object of Safety Rule 182 is to avoid exactly the type of accident which occurred in this case. Employees are required to maintain a lookout forward *to avoid coming in contact with cars on adjacent tracks*. If their vision is obscured, or the location of cars on the adjacent track is indefinite, trainmen are required "to keep in the clear". This means staying in a position of safety. Richmond had alternatives. He could have remained on the brake platform until the car had cleared the hopper car; he could have moved over to the front ladder so as to be in position to move quickly to the side ladder when the hopper car was cleared; or he could have ridden on the side ladder, where the safety rules required him to be, and stood erect against the grab irons until the hopper car was cleared. Instead, without looking, or without seeing what was there to be seen, he unfortunately moved or swung from the front around to the side of the car at precisely the time and place the movement should not have been made, and was thereby injured.

Richmond testified that he intended to move from the brake platform to the side ladder in order to be in position to watch out for people at the crosswalk and to give signals to the engineer. He also said that he planned to get off the boxcar east of the passenger station and make

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arrangements with the dispatcher for it to be pushed across the main line. However, Lilly testified that the point where the accident occurred was approximately 18 car lengths, or 900 feet, from the crosswalk. Appellee therefore had ample time in which to move to the side ladder after the train had cleared the hopper car.

Appellee alleges that his injury was caused in whole or in part by the negligence on the part of the C & O. To prove negligence, he sought to establish the close clearance between the boxcar and the hopper car; the failure on the part of C & O and his fellow trainmen to warn him of the danger; and the unsafe condition of the C & O's roadbed.

Frequent reference was made to the hopper car as a "jumbo hopper". The clearance between this car and a boxcar is only $1\frac{5}{8}$ inches less than is the clearance between two boxcars. While there is no proof that a clearance of $21\frac{1}{2}$ inches between the cars was not adequate for a man standing erect on the stirrup of the side ladder, Richmond was not standing on the ladder; he was trying to reach the ladder and then descend it. Witnesses testified that this type hopper car is not unusual in any manner and that thousands are currently in use. The engineer Harrah testified, referring to the hopper cars, "All the cars we handle now are those type of cars."

Richmond alleged that the C & O was negligent in not warning him of a dangerous situation. This accident occurred in a railroad yard where cars are constantly being moved in, stored and moved out. Railroad cars are of various kinds, shapes and sizes, and all railroad employees know this. It was a routine switching operation that was being conducted by Richmond and his crew. Richmond is an experienced trainman, having had 27 years service at

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the time of this accident. He was familiar with the Ronceverte yard, with freight cars generally, and with the job that he was doing. Rule 182 is a warning to trainmen to maintain a lookout for close clearance by reason of cars on adjacent tracks. None of Richmond's fellow employees could have reasonably foreseen that he would make the maneuver that he made at the time and place that he made it. Nor did they have sufficient time to give a warning even if such a warning had been indicated. Bennett said the accident occurred *just as the two cars met* and as Richmond came from the brake step to the side ladder. Lilly said it happened *just the instant, almost simultaneously* when Richmond came around to the side ladder. Richmond never saw the hopper car and said that *when he made his move*, or swung around to the side of the car, that was the last thing he remembered. Richmond was himself in the best position to see the hopper car and to note its "dangerous proximity" on the adjacent track, if in fact the hopper was so near the boxcar as to pose any threat of danger to him.

The testimony regarding the condition of the roadbed and the swaying and rocking of the car was vague and affords a basis for speculation only. On cross-examination Richmond was asked: "You are now telling the jury that it was not the close clearance, but the rocking of the car that knocked you off the car?" Appellee replied: "I'd say it was the rocking of the car that knocked me off, yes, sir, or swaying, whichever you want to call it." In his statement made soon after the accident Richmond did not complain of the condition of the roadbed or the rocking or swaying of the boxcar. It was at trial that he first testified: "This car that I was riding rocked backwards and forwards." However, when asked, "What if any problems can

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it [rocking] cause to you as a conductor or brakeman?", appellee responded: "Well, I don't really know as there would be any difference riding the side ladder than there would be up on the platform when there is a swaying." The sum of appellee's testimony was that the track conditions throughout the whole Ronceverte area were "pretty bad".

No witness testified as to any specific defect in the track at the point where the accident occurred, or testified that there was any depression, elevation or unusual condition at that point. There was testimony by Lilly that in the general area there were places where the ballast under the ties was loose and that that sometimes caused a rocking motion. Lilly, when asked if he was in a position to say that that condition existed where the accident happened, responded: "No. I can't say it existed where the accident happened." He further said that he didn't remember seeing any rocking of the car, and that he couldn't say that the car rocking had anything to do with the accident.

Robert Sams, trainmaster, testified that he had never received any complaint from Richmond regarding the condition of the ballast or the condition of the passing track in the Ronceverte yard. When asked by counsel for appellee if railroad cars traveling over the tracks would rock and roll and sway, Sams answered: "Well, railroad being railroad, on the best kept track a car will sway."

In our view of the record, there is no evidence, nor any inference which reasonably may be drawn from the evidence when viewed in the light most favorable to the appellee, which could sustain the verdict. We find no rational basis for concluding that there was negligence by the C & O which contributed in whole or in part to the injuries suffered by Richmond.

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Clearly, under the circumstances that existed, there was no duty on the part of appellant or appellee's fellow trainmen to have warned Richmond of the presence of the hopper car. Neither was there evidence from which the jury could have found that the C & O's roadbed was so defective at the point of the accident as to have contributed to its happening. Unlike *Ellis v. Union Pac. R. Co.*, 329 U.S. 649 (1947), which involved an overhang of a car, a tilt on a curve toward a building, and a higher outside rail, there is no evidence here of any disparity in the height of the rails, and the two adjacent tracks involved were straight. We can safely assume that there was some rocking or other motion of the boxcar on which Richmond was riding, notwithstanding this car was being pushed at a speed of only eight mph. A degree of rocking and swaying of rail cars is present whenever such cars are moved. However, there is no evidence in the instant case that this was caused by any negligent act or omission on appellant's part.

To hold that the C & O was negligent in having placed the hopper car on the fill-out track would in effect say that any railroad is negligent as a matter of law if it parks a railroad car where its side will be $21\frac{1}{3}$ inches from cars passing on an adjacent track. In the instant case it was not the amount of clearance between the two cars that proximately caused or effectively contributed to cause the accident suffered by Richmond.

The real cause of Richmond's injuries was his own negligence, and the acts of the employer alleged to constitute negligence played no causative part. We need only consider the evidence of Richmond and his fellow trainmen. Richmond admits that he did not see the hopper car. He did not know or had forgotten it was on the fill-out track.

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When he made his move around the corner of the boxcar he was completely oblivious of its presence. This admission not only convicts Richmond of a violation of Safety Rule 182, but of negligence. Although Richmond was on the brake platform, where he did not belong, during the pushing operation, he was in a place of safety so far as any "contact with structures or obstructions alongside of track, or with cars, locomotives, or trains on adjacent track" was possible. We do not have to speculate on why he attempted to move from the front to the side of the boxcar at the exact time and place and in the manner he did, instead of waiting the few seconds necessary for the cars to pass. The appellee provided the answer when he admitted that he was unaware of the presence on the adjacent track of a hopper car with which he had to avoid coming into contact.

We conclude that the evidence established as a matter of law that Richmond's independent and negligent act was the sole cause of the accident and his injuries. No negligence of the C & O was shown that contributed in whole or in part to the accident.

Reversed and final judgment.

I'Anson, C.J., dissenting.